

2005 DRAFTING REQUEST

Bill

Received: **08/29/2005**

Received By: **rnelson2**

Wanted: **As time permits**

Identical to LRB:

For: **Glenn Grothman (608) 266-7513**

By/Representing: **Ellen**

This file may be shown to any legislator: **NO**

Drafter: **rnelson2**

May Contact:

Addl. Drafters:

Subject: **Courts - torts**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Grothman@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Punitive damage definition

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?							
/1	rnelson2 09/07/2005	kfollett 10/07/2005	rschluet 10/07/2005		lnorthro 10/07/2005		
/2	rnelson2 10/12/2005	kfollett 10/12/2005	pgreensl 10/13/2005		lemery 10/13/2005 lemery 10/18/2005	mbarman 11/21/2005	

FE Sent For:

<END>

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				_____	lemery 10/18/2005		

email only

- 3563
Grothman
Jacket
per RPN

FE Sent For:

<END>

2005 DRAFTING REQUEST

Bill

Received: 08/29/2005

Received By: rnelson2

Wanted: As time permits

Identical to LRB:

For: Dale Schultz (608) 266-0703

By/Representing: Ellen

This file may be shown to any legislator: NO

Drafter: rnelson2

May Contact:

Addl. Drafters:

Subject: Courts - torts

Extra Copies:

Submit via email: YES

Requester's email: Sen.Schultz@legis.state.wi.us

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Pre Topic:

No specific pre topic given

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Wanted: **As time permits**

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For: **Dale Schultz (608) 266-0703**

By/Representing: **Ellen**

This file may be shown to any legislator: **NO**

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May Contact:

Addl. Drafters:

Subject: **Courts - torts**

Extra Copies:

Submit via email: **YES**

Requester's email: **Sen.Schultz@legis.state.wi.us**

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No specific pre topic given

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/1	rnelson2 09/07/2005	kfollett 10/07/2005	rschluet 10/07/2005		lnorthro 10/07/2005		

FE Sent For:

12 kjf
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<END>

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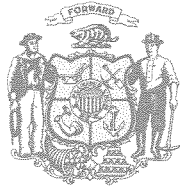
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FE Sent For:

<END>



WISCONSIN STATE SENATE
MAJORITY LEADER
DALE W. SCHULTZ

August 26, 2005

Mr. Robert Nelson
Legislative Reference Bureau
State of Wisconsin
1 East Main Street, Suite 200
Madison, WI 53703

Re: Punitive Damages Bill Draft

Dear Bob,

Attached is draft language regarding the standards for recovery of punitive damages to be put into legislative bill format. Following is the basis explaining the need for the Legislature to amend the language which it adopted in 1995. In light of the recent Supreme Court decisions (including punitive damages); their impact on Wisconsin's national image regarding its legal environment; and the need for expedited legislative action, I request that this bill draft be given high priority.

Punishment and deterrence are the only legitimate reasons for the assessment of punitive damages in civil cases. Even though providing more money to the injured party, an award of punitive damages does nothing to make a plaintiff whole – that is accomplished through the award of special/economic damages and, in appropriate cases, noneconomic damages.

Since the civil justice system (in lieu of the criminal justice system) is being used for the above referenced purposes, the bar for assessment of punitive damages must be set high and used in only the most egregious cases. In 1995, the Legislature agreed that the standard had eroded over the years to mirror merely a heightened degree of negligence. The Legislature adopted a strict standard for the award of punitive damages, which was, at the time, believed to be among the most stringent in the country. (1995 Wis. Act 17)

On March 18, 2005, the Wisconsin Supreme Court handed down two opinions relating to Wisconsin law on punitive damages. The Court issued its interpretation of the Wisconsin statute [s. 895.85 (3)] adopted in the 1995 legislative session. The recent rulings were in a drunken driving case and the high profile Mitsubishi case.

While the Court recognized that the Legislature created a "heightened standard" in its adoption of s. 895.85 (3), it rejected the stricter interpretation of the Appeals Court in the Mitsubishi case, reversed that decision, and held that the punitive question was appropriate to be presented to the jury.

Despite its recognition of legislative intent to adopt a heightened standard, the majority on the Supreme Court actually used the opportunity to craft a standard, based on the Court's interpretation, that is weaker than that which existed prior to the Legislature's action in the 1995 session. In fact, the punitive damage legislation had the result intended by the Legislature, which is to limit punitive damages to the most egregious cases where punishment (outside of the criminal justice system) and deterrence are appropriate under common law – until the Court issued its opinion in these two cases. (*LeRoy M. Strenke v. Levi Hogner and Nau Country Insurance Company & Patricia Wischer, et. al v. Mitsubishi Heavy Industries America, Inc., et.al.*)

The attached draft language responds directly to the two above referenced Court cases and restores the stands for the recovery of punitive damages that that originally intended by the State Legislature in 1995 Wisconsin Act 17.

Thank you.

With kindest regards,

Dale W. Schultz
Senate Majority Leader

Bill Request Form

Legislative Reference Bureau

100 N. Hamilton Street

Legal Section 266-3561

You may use this form or talk directly with the LRB attorney who will draft the bill.

Date 8/26/05

Legislator, agency, or other person requesting this draft Sen. Schultz

Person submitting request (name and phone number) Eileen Schoenfeldt, 266-0703

Persons to contact for questions about this draft (names and phone numbers) _____

Eileen Schoenfeldt, 266-0703

Describe the problem, including any helpful examples. How do you want to solve the problem?

see attached

Please attach a copy of any correspondence or other material that may help us. If you know of any statute sections that might be affected, list them or provide a marked-up copy.

You may attach a marked-up copy of any LRB draft or provide its number (e.g., 2001 LRB-2345/1 or 1999 AB-67).

Requests are confidential unless stated otherwise. May we tell others that we are working on this for you? YES ☒ NO

If yes:

Anyone who asks? YES ☒ NO

Any legislator? YES ☒ NO

Only the following persons _____

Do you consider this request urgent? YES ☒ NO

If yes, please indicate why _____

Should we give this request priority over any pending request of this legislator, agency, or person?

YES ☒ NO

895.85 Punitive damages. (1) DEFINITIONS. In this section:

- (a) "Defendant" means the party against whom punitive damages are sought.
 - (b) "Double damages" means those court awards made under a statute providing for twice, 2 times or double the amount of damages suffered by the injured party.
 - (c) "Plaintiff" means the party seeking to recover punitive damages.
 - (d) "Treble damages" means those court awards made under a statute providing for 3 times or treble the amount of damages suffered by the injured party.
 - (e) **"Intent to cause injury to the plaintiff" means the defendant has:**
 - (1) a general intent to perform the act causing the injury, and**
 - (2) either**
 - (i) a specific intent to cause injury to a specific person or persons by that act;**
 - or**
 - (ii) knowledge that the act is practically certain to result in injury to any person.**
- (2) SCOPE. This section does not apply to awards of double damages or treble damages, or to the award of exemplary damages under ss. 46.90 (6) (c), 51.30 (9), 51.61 (7), 103.96 (2), 134.93 (5), 146.84 (1) (b) and (bm), 153.85, 252.14 (4), 252.15 (8) (a), 610.70 (7) (b), 943.245 (2) and (3) and 943.51 (2) and (3).
- (3) STANDARD OF CONDUCT. The plaintiff may receive punitive damages if evidence is submitted showing that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of **with intent to cause injury to** the plaintiff.
- (4) PROCEDURE. If the plaintiff establishes a prima facie case for the allowance of punitive damages:
- (a) The plaintiff may introduce evidence of the wealth of a defendant; and
 - (b) The judge shall submit to the jury a special verdict as to punitive damages or, if the case is tried to the court, the judge shall issue a special verdict as to punitive damages.
- (5) APPLICATION OF JOINT AND SEVERAL LIABILITY. The rule of joint and several liability does not apply to punitive damages.



10-11
State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-3563/1

RPN: kjf

2005 BILL

D-Note

Gen

1 AN ACT ...; relating to: punitive damage awards.

Analysis by the Legislative Reference Bureau

X Under current law, a person injured by a negligent person can recover the damages resulting from the injury, including economic damages, such as his or her medical costs, and noneconomic damages, such as compensation for pain and suffering. In addition, the plaintiff may recover punitive damages if he or she can prove that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

This bill changes the proof that the plaintiff must provide to recover punitive damages. Under the bill, the plaintiff must prove that the defendant acted with the intent to perform the act that caused the injury and that the defendant either acted with the intent to cause injury to a particular person or persons or that the defendant knew that the act was substantially certain to result in injury to one or more persons.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 895.85 (3) of the statutes is renumbered 895.85 (3) (intro.) and
3 amended to read:

4 895.85 (3) (intro.) The plaintiff may receive punitive damages if evidence is
5 submitted showing that the defendant acted maliciously toward the plaintiff or in an

BILL**SECTION 1**

1 ~~intentional disregard of the rights of the plaintiff,~~ ^e with the intent to perform the act
2 that caused the injury and at least one of the following applies:

3 **SECTION 2.** 895.85 (3) (a) of the statutes is created to read:

4 895.85 (3) (a) The defendant acted with the intent to cause injury to a
5 particular person or persons.

6 **SECTION 3.** 895.85 (3) (b) of the statutes is created to read:

7 895.85 (3) (b) The defendant knew that the act was substantially certain to
8 result in injury to one or more persons.

9 History: 1995 a. 17; 1997 a. 71; 1999 a. 79.

9 **SECTION 4. Initial applicability.**

10 (1) This act first applies to ^{actions} ~~acts~~ that occur on the effective date of this
11 subsection.

12 (END)

D-Note

**DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU**

LRB-3563/1dn

RPN: *kyf*

Date

I made some changes in the draft for clarity, our conventions, and ease of reading.

We do not put substance in definitions, so I took the language from the proposed definition and put that in the substance of the statute.

The terms "general intent" and "specific intent" were replaced with "intent" because the content of the sentence provides the information suggested by those adjectives.

X I replaced "practically certain" with "substantially certain" because that is the term that is quoted by J. Wilcox's dissent in *Wischer v. Mitsubishi* from the punitive damage treatise by the Marquette professors. The term "substantially" is used over 1000 times in our statutes, "practically" is used once, so I believe that the former is better understood by the legal community.

Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3563/1dn
RPN:kjf:rs

October 7, 2005

I made some changes in the draft for clarity, our conventions, and ease of reading.

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Robert P. Nelson
Senior Legislative Attorney
Phone: (608) 267-7511
E-mail: robert.nelson@legis.state.wi.us

Nelson, Robert P.

From: Schoenfeldt, Eileen
Sent: Wednesday, October 12, 2005 10:24 AM
To: Nelson, Robert P.
Subject: FW: practically certain v. substantially certain

From: Jim Hough [mailto:ough@hamilton-consulting.com]
Sent: Tuesday, October 11, 2005 5:29 PM
To: Schoenfeldt, Eileen
Subject: practically certain v. substantially certain

Eileen,

Following is a summary of the feedback on "practically" vs. "substantially". You may want to pass this on to Bob and keep in your file.

Thanks for all of your help.

Jim

James Hough
The Hamilton Consulting Group, LLC.
ough@hamilton-consulting.com
Phone: (608) 258-9506
Fax: (608) 283-2589

The distinction between "practically certain" and "substantially certain" was discussed in Justice Ann Walsh Bradley's opinion in *Strenke v. Hogner*, 2005 WI 25, the companion case to *Wischer*. Justice Bradley first cites the following quote from *Shepard v. Outagamie County Circuit Court*, 189 Wis. 2d 279, 286-87, 525 N.W.2d 764 (Ct. App. 1994):

"The legal definition of 'intentional' is essentially the same, whether found in tort law or in criminal law A person may be said to have intentionally caused the result where the result is substantially certain to occur from the actor's conduct. (Citation omitted.) The definition of 'intentionally' in the criminal code, § 939.23(3), STATS., is similar: 'Intentionally' means that the actor either has specified a purpose to do the thing or cause the result specified, or is aware that his conduct or her conduct is practically certain to cause that result." *Strenke*, 2005 WI 25, ¶ 35, *quoting Shepard*.

Justice Bradley then adopts the "substantially certain" formulation, noting: "In this opinion, we do not use the 'practically certain' language of the criminal statute, but rather retain the 'substantially certain' language cited above. This change does not affect the jury verdict in this case." *Strenke*, 2005 WI 25, ¶ 36, n. 6. Justice Bradley then notes that the Restatement (Second) of Torts §8A (1965) uses the "substantially certain" not the "practically certain" language.

It looks like Justice Bradley is trying to say that "practical certainty" is for use in criminal law only and "substantial certainty" is proper for civil cases. However, if one considers that punitive damages are, from a policy perspective, designed to punish a wrongdoer, why shouldn't the higher criminal standard apply? Burdens of proof and appellate standards of review are higher for punitive damages than compensatory damages, in part,

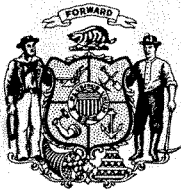
10/12/2005

for this reason.

Furthermore, the phrase "practically certain" appears in the model jury instruction on punitive damages, Wis. JI-Civil 1707.1 ("A person acts in an intentional disregard of the rights of the plaintiff if the person acts with a purpose to disregard the plaintiff's rights or is aware that his or her acts are *practically certain* to result in the plaintiff's rights being disregarded") (emphasis added). Note 2 to the jury instruction states: "The Committee finds the statutory formulation of criminal intent in Wis. Stat. §939.23 to be helpful. 'Intentionally' means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his or her conduct is *practically certain* to cause that result." (emphasis added).

Jurors, therefore, have been receiving the "practically certain" instruction for nearly 10 years. The jurors in *Strenke* and *Wischer* received that instruction. The Court of Appeals in *Wischer* used the term "practical certainty" as did the Court of Appeals in the *Strenke* certification order. In that light, the drafter's concern that "practically certain" is not as well-understood by the legal community as "substantially certain" seems unfounded.

In sum, given its long-standing use in the jury instruction and the common understanding of the term "practically certain" arising from its use in the criminal context, there is no reason for the punitive damages statute to adopt to the "substantially certain" language imposed by the Supreme Court in *Strenke* and *Wischer*.



5000 (In 10/12)
State of Wisconsin
2005 - 2006 LEGISLATURE

LRB-3563/1

RPN:kjf/12

2005 BILL

under current law, as interpreted by the supreme court, in Wischer v. Mitsubishi, 2005 WI 26, 279 Wis. 4 (2005), $\Delta 2d \Delta$

Regen

practically

- 1 AN ACT to renumber and amend 895.85 (3); and to create 895.85 (3) (a) and
2 895.85 (3) (b) of the statutes; relating to: punitive damage awards.

Analysis by the Legislative Reference Bureau

Under current law, a person injured by a negligent person can recover the damages resulting from the injury, including economic damages, such as his or her medical costs, and noneconomic damages, such as compensation for pain and suffering. In addition, the plaintiff may recover punitive damages if he or she can prove that the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff.

This bill changes the proof that the plaintiff must provide to recover punitive damages. Under the bill, the plaintiff must prove that the defendant acted with the intent to perform the act that caused the injury and that the defendant either acted with the intent to cause injury to a particular person or persons or that the defendant knew that the act was substantially certain to result in injury to one or more persons.

the defendant's action

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- 3 SECTION 1. 895.85 (3) of the statutes is renumbered 895.85 (3) (intro.) and
4 amended to read:

BILL**SECTION 1**

1 895.85 (3) (intro.) The plaintiff may receive punitive damages if evidence is
2 submitted showing that the defendant ~~acted maliciously toward the plaintiff or in an~~
3 intentional disregard of the rights of the plaintiff. ~~with the intent to perform the act~~
4 ~~that caused the injury and at least one of the following applies:~~ *did any*

5 **SECTION 2.** 895.85 (3) (a) of the statutes is created to read:

6 895.85 (3) (a) ~~The defendant~~ acted with the intent to cause injury to a
7 particular person or persons.

8 **SECTION 3.** 895.85 (3) (b) of the statutes is created to read:

9 895.85 (3) (b) ~~The defendant~~ *defendant's action* knew that the ~~act~~ *practically* was substantially certain to
10 result in injury to one or more persons.

11 **SECTION 4. Initial applicability.**

12 (1) This act first applies to actions that occur on the effective date of this
13 subsection.

14 (END)

Emery, Lynn

From: Schoenfeldt, Eileen
Sent: Tuesday, October 18, 2005 11:36 AM
To: LRB.Legal
Cc: Emerson, James; Nelson, Robert P.
Subject: LRB 3563/2, punitive damages

Senator Grothman will now be introducing the punitive damages bill, LRB 3563/2. Please send his office an electronic version with the bill jacketing buttons. Thanks.

**Eileen Schoenfeldt
Office of Senator Dale Schultz
608-266-0703
800-978-8008**